(1)

88-210

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

IRA HENDERSON MURPHY, PETITIONER

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Sixth Circuit Court of Appeals err in refusing to reverse and remand the Defendant's obstruction of justice and perjury convictions, after vacating eleven (11) mail fraud convictions, and finding that the Trial Court's instructions to the Jury regarding mail fraud improperly broadened the scope of the indictment to include an unindicted offense, when the Trial Court had ruled pre-trial that the Government would be permitted to broaden the indictment and ruled during the trial that evidence to support same was admissible?

2. Did the Sixth Circuit Court of Appeals err in refusing to follow the Second, Ninth, and Eleventh Circuit Courts of Appeal apparent application of this Court's reasoning in United States v. Lane, 474 U.S. 88 L. Ed 2d, 814 (1986) by holding

that the "spillover" of the evidence and testimony relating to the Defendant's eleven (11) mail fraud convictions so tainted the remaining two (2) convictions on obstruction of justice and perfury that they must be reversed and remanded?

(a) Inasmuch as the parties agreed in Appeal Briefs before the Sixth Circuit Court of Appeals that the Defendant's credibility was the basis for his convictions on the obstruction and perjury counts, did the Sixth Circuit err in failing to find that the Defendant was prejudiced by the "spillover" effect of the evidence and testimony relating the mail fraud counts?

3. Did the Sixth Circuit Court of Appeals err in failing to follow the Fifth Circuit Court of Appeals and find that the Defendant's perjury conviction should be

overturned on the grounds that he responded with the literal truth?

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Petitioner, Ira Henderson Murphy, by and through counsel, respectfully seeks a writ of certiorari to review the Sixth Circuit Court of Appeals' judgment in this case.

OPINIONS BELOW AND JURISDICTION

The opinion of the Court of Appeals (App. A, infra, 1a-25a) as not yet been reported. The judgment of the District Court is not reported (App. B, infra, 26a).

The judgment of the Court of Appeals was entered on January 4, 1988 and

issued as mandate on June 10, 1988 (App. C, infra, 28a). The Petitioner's Petition for Rehearing was denied on March 7, 1988 (App. D, infra, 29a), as was that of the United States of America, on May 16, 1988 (App. E, infra, 30a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1)

STATUTES INVOLVED

See Appendix F.

STATEMENT OF THE CASE

The Petitioner (Defendant herein) was indicted in December, 1985 in the Western District of Tennessee, Western Division on eleven (11) counts of mail fraud (18 U.S.C. 1341, 42), one (1) count of obstruction of justice (18 U.S.C. 1503) and one (1) count of perjury (18 U.S.C. 1623). The Defendant, who was a duly elected judge of the General Sessions Court of the State of Tennessee, was accused of utilizing the mail to obtain a permit from the State to operate a bingo

operation on behalf of the H. D. Whalum Lodge, which the Government claimed was not entitled to such a permit. Once an on-going Grand Jury investigation into bingo operator Ronnie Smith began to focus on the Lodge, the Government charged that the Defendant's conversations with an alledged Lodge official amounted to obstruction of justice, and that his own testimony before the Grand Jury was perjured. His trial began June 30, 1986, and he was convicted on July 11, 1986 on all thirteen (13) counts by a petit jury after less than one (1) day of deliberations.

Pre-trial motions were head on March 28, 1986, and written Orders were filed with the Clerk on April 1st and 30th, 1986. The Defendant argued that his Motion Pursuant to Rule 7 (d) of the Federal Rules of Criminal Procedure to strike language in the indictment pertaining to his alleged receipt of funds from the Lodge account should be

granted, inasmuch as there was no allegation of illegal receipt of funds by him contained in the indictment, nor any criminal charge lodged in connection therewith. The Government responded by stating that the receipt of funds by the Defendant went to his motive and was relevant to show that he received the funds. The Trial Judge held that the purpose of the fraud or scheme, under the mail fraud statute, was to benefit the Defendant by personal financial gains, and overruled the Motion as it related to the matters heretofore described. In light of the Court's rulings, no Motion for Severance was filed by the Defendant.

At the trial of the cause, the Trial Judge permitted the introduction of evidence and testimony relating to the amount of money raised by Memphis Catholic High School bingo games, records of another organization which, along with the Lodge, sponsored bingo games run by Smith, testimony by Smith that

he had given "payoffs" to sponsors of games he operated, including the Defendant, testimony by Smith's former employees that they had received unreported cash income from Smith (although they all admitted they had no dealings with the Defendant), as well as the testimony of two (2) other sponsors who admitted receiving payoffs from Smith.

The Government relied on the testimony of Charles Brooks, who made audio tape recordings of conversations with the Defendant, to interpret those conversations to mean that the Defendant's statements amounted to obstruction of justice. Although Brooks was a convicted felon, and considered elusive and unreliable by the Government's own witnesses, including Federal agents, and much of his testimony supported the Defendant's account of what occured, the jury evidently believed Brooks.

The Defendant testified regarding the perjury charge that he was confused about

certain documents he was being questioned about, as were some Government witnesses at trial, and that he responded with the literal truth to other questions. Again, the jury evidently discounted his account of what occured.

The Defendant's Motion for a Directed Verdict, or in the Alternative a Motion for a New Trial and Motion to Address the Jurors were denied September 5, 1986 by the Trial Judge, which sentenced him to incarceration for five (5) years on all counts, to run concurrently, and imposed a fine of Five Thousand Dollars ($5,000.00) as to the obstruction of justice count.

A Notice of Appeal to the Sixth Circuit Court of Appeals was timely filed, briefs submitted by the parties, oral argument was heard, post-argument briefs were requested and filed, and on January 4, 1988, the Sixth Circuit held that all eleven (11) mail fraud counts should be vacated,

inasmuch as the bingo permits and the State's right to accurate information regarding the issuance of same were intangible property, and a scheme to obtain those permits by the Defendant, who was not indicted in his official capacity, did not state a crime. The Court further held that even if it incorrectly interpreted this Court's decision in McNally v. United States, 107 S. Ct. 2875 (1987), it would still require the vacation of the mail fraud counts and remand them inasmuch as the Trial Court's instructions to the jury broadened the scope of the indictment by requiring the Defendant to defend against an uncharged scheme or artifice to obtain money by false pretenses, representations or promises.

While the Sixth Circuit recognized the Trial Court's improper broadening of the scope of the indictment regarding money, it nonetheless refused to acknowledge the effect of the proof introduced in connection

therewith, and the tainting caused to the Defendant's credibility, which was at issue in the obstruction of justice and perjury charges. The Sixth Circuit refused to reverse and remand the convictions of obstruction and perjury because of a "spillover" effect, despite decisions requiring that action in the Second, Ninth and Eleventh Circuits. The Sixth Circuit further refused to adopt and apply the Eleventh Circuit's test to determine whether the "spillover" effect requires reversal. The Sixth Circuit noted that, "While related with respect to motive, the mail fraud charges constituted conceptually a totally separate type of crime from that of obstructing justice and perjury." (App. A, 16 a)

The Sixth Circuit denied the Defendant's Petition for Rehearing, as well as the Government's Petition for Rehearing with Suggestion for Rehearing En Banc, after

requesting briefs from the parties regarding the Government's Petition. The Defendant now timely moves for a Writ of Certiorari.

REASONS FOR GRANTING WRIT

1. Did the Sixth Circuit Court of Appeals err in refusing to reverse and remand the Defendant's obstruction of justice and perjury convictions, after vacating eleven (11) mail fraud convictions, and finding that the Trial Court's instructions to the jury regarding mail fraud improperly broadened the scope of the indictment to include an unindicted offense, when the Trial Court had ruled pre-trial that the Government would be permitted to broaden the indictment and ruled during the trial that evidence to support same was admissable?

The Defendant was indicted on eleven (11) counts of mail fraud for allegedly devising a scheme to defraud the State of Tennessee of the right to issue a permit, or certificate of registration, to operate a bingo game, based on complete, true and accurate information to be provided by those applying for those permits. The indictment went on to state that the Defendant used the mails to supply allegedly false information

to the State on behalf of the H. D. Whalum Lodge, which the Government alleged was not qualified to hold a permit, and that once the permit was obtained and the game was operational, he converted funds from the game to his own use. Although the Defendant was not charged with converting and/or receiving those funds, the Trial Court refused to grant the Defendant's Motion to strike that language from the indictment, holding that the purpose of the alleged scheme to defraud the State was to benefit the Defendant financially. During the course of the trial, the Court permitted the Government to introduce testimony and evidence relating to those funds. The jury was permitted to hear about Catholic High School's bingo game, which kept a high percentage of proceeds in contrast to the Lodge, which paid Ronnie Smith to operate the game and who utilized a high percentage of the proceeds for operating expenses.

Smith was indicted and convicted in connection with the operation of bingo games for various sponsors. He testified against the Defendant, prior to his own sentencing, and with the grant of immunity. Smith testified to paying his employees in cash, in violation of Internal Revenue Service codes, and to making cash payments to sponsors of games he operated, including the Defendant, even though such testimony was beyond the scope of the indictment. Smith's former employees and two sponsors confirmed his account of cash payments. All such testimony was ruled to be relevant as to motive and admissible, despite the Defendant's objections that it went to crimes for which the Defendant was not indicted.

Charles Brooks testified regarding the obstruction of justice charge. He was a convicted felon whom the Government's own witnesses considered unreliable. He

explained audio tape conversations with the Defendant by claiming that the Defendant offered him money in exchange for exculpatory testimony before the Grand Jury. Although Brooks admitted having worked for the Defendant doing repairs during this same period of time, he denied that the money referred to was for that work. The Defendant contradicted Brooks' testimony, and introduced receipts to Brooks for repair work, which Brooks acknowledged was for that work, during that time. The jury, however, discounted the Defendant's testimony.

As to the Defendant's alleged perjury before the Grand Jury, he testified that he was confused as to certain documents he was questioned about, as were other Government witnesses when similarly confronted with those documents, and that he responded with the literal truth.

The Defendant submits that the

improper broadening of the indictment prior to and during the trial, especially as reflected in the instructions to the jury, had a devastating effect on his credibility, and that the Government did not submit proof beyond a reasonable doubt as to the obstruction of justice and perjury charges, unless the credibility of the witnesses is weighed. The proof regarding the obstruction of justice came down to the word of Brooks versus that of the Defendant; more simply put, a convicted felon versus a member of the bar, a member of the Tennessee Legislature for fourteen (14) years, and a duly elected member of the judiciary of the State for three (3) years.

2. Did the Sixth Circuit Court of Appeals err in refusing to follow the Second, Ninth and Eleventh Circuit Courts of Appeal by holding that the "spillover" of the evidence and testimony relating to the Defendant's eleven (11) mail fraud convictions, so tainted the remaining two (2) convictions on obstruction of justice and perjury that they must be reversed and remanded?

(a) Inasmuch as the parties agreed that the Defendant's credibility was

the basis for his convictions on the obstruction and perjury counts, did the Sixth Circuit err in failing to find that the Defendant was prejudiced by the "spillover" effect of the evidence and testimony relating to the mail fraud counts?

Several Circuit Courts have followed the holding of this Court in United States v. Lane, 474 U.S.--, 88 L. Ed.2d 814 (1986), in refusing to let convictions stand when they are based on "spillover" evidence which results in actual prejudice because of a substantial and injurious effect or influence, particularly where the accused's credibility is a critical issue. United States v. Pagan, 721 F.2d 24 (2nd Cir. 1983). Courts have used similar reasoning to reverse convictions based on the cumulative effect of "bad" evidence. United States v. Wolf, 820 F.2d. 1499 (9th Cir. 1987). In Wolf, the Court held that even though the Trial Court had attempted to cure the Government's improper admission of evidence through its instruction to the

jury, that was not enough to "repair the damage caused by the indictment, testimony and argument", and ordered the conviction relating to that proof reversed and remanded. Id., at 1505. The Second Circuit has reversed a conviction even though it believed there was sufficient evidence to support same, based on the introduction of improper evidence and allegations. United States v. Guiliano, 644 F.2d 85 (2nd Cir. 1981), United States v. Tussa, 816 F.2d 58 (2nd Cir. 1987). The Tussa case involved the improper introduction of hearsay evidence, and the Court held that a reversal was required for the co-defendants affected, "Even if an Appellate Court is without doubt that a Defendant is guilty, there must be a reversal if error is sufficiently serious. Id., at 67, citing Bollenbach v. United States, 326 U.S. 607 (1946), United States v. Bozza, 365 F.2d 206 (2nd Cir. 1966). The Eleventh Circuit developed a two-step test

to determine whether the "spillover" effect requires reversal: 1. Did the jury meticulously sift the evidence?; and 2. Was the Defendant prejudiced by a spillover of evidence relating to the other counts? United States v. Stefan, 784 F.2d 1093 (11th Cir. 1986).

The Sixth Circuit declined to adopt the Stefan test in the instant case on the grounds that it was "difficult to apply" and that it was "designed for rank speculation as to what occurred in the privacy of the jury room during deliberations." (App. A, 16 a). Rather, the Court analyzed the problem of "spillover" in terms of a defendant's failure to request a severance of the charges.

The Defendant submits that the Sixth Circuit's reasoning is inapplicable in this case, inasmuch as it attempts to require a motion for severance of offenses as a condition precedent to reviewing the

spillover of improper testimony and evidence relating to eleven (11) charges on two (2) remaining counts. The Sixth Circuit acknowledged that all counts were related, and the Defendant would respectfully suggest that a severance motion would have been considered, at the least, frivolous, particularly in light of the Trial Court's ruling on the Defendant's Motion Pursuant to Rule 7(d) that several pages of the indictment dealing with the Defendant's receipt of funds would not be stricken because of the Government's allegation that "the purpose was to benefit Mr. Murphy by financial gains for himself," despite the acknowledgment by the Court and the Government that the Defendant had not been charged criminally with receiving those funds. (Report date and hearing on Motions, March 28, 1986, App. G , 4Ø- 48a) See, United States vs. Fagan, 821 F.2d 1ØØ2 (5th Cir. 1987) (mail fraud counts were properly

joined with interstate threat and witness intimidation counts since they were related to the fraudulent scheme and admissible to show motive). While the Stefan test does require a review of the record, it does not require "rank speculation" as the Sixth Circuit held. On the contrary, the objective facts, which include a trial of nine (9) days and numerous Government witnesses, only four (4) of whom testified regarding the convictions in question, and deliberations of less than one (1) day, all tend to suggest that the jury was unable to separate and treat distinctively the evidence related to each count.

In each of the briefs filed with the Sixth Circuit, the parties agreed that the Defendant's credibility was at issue regarding the obstruction and perjury charges. The Defendant submits that absent the witnesses and evidence introduced in connection with the mail fraud counts, much

of it improper and dealing primarily with the illegal activity of others connected with Ronnie Smith's operation, there would have been a different outcome as to the remaining charges, inasmuch as his credibility would not have been so undermined by the taint resulting from the spillover of that proof.

The Sixth Circuit also ruled in this case that even if the indictment survived McNally inspection, the mail fraud convictions could not be sustained in light of the Court's charge to the jury that the Defendant was guilty of those counts if it found that the scheme or artifice was "to obtain money...by means of false pretenses, representations or promises. (App. A., 13 a, emphasis theirs) The Court further held that, "It is well established that when the Court, by its jury charge, changes the crime from that for which the Defendant was indicted, a subsequent guilty verdict must

be vacated." Id., relying on Stirone v. United States, 361 U. S. 212 (1960); Cf. United States v. Miller, 471 U. S. 130 (1985); United States v. Runnels, 833 F.2d 1183 (6th Cir. 1987). The Runnels case held that when several theories are presented to a jury, and one is determined to be invalid, a conviction which is not based separately and specifically on a valid theory usually cannot stand because it is impossible to tell which theory the jury followed. Runnels, at 1189. That reasoning was not extended to the Defendant's argument that the improper charge relating to the mail fraud counts was based on the pre-trial ruling which subsequently permitted an overwhelming amount of proof regarding the obtaining of money, and which the Defendant contends had a devastating effect on his credibility.

There was a clear implication throughout the Defendant's trial that he was

guilty not only of fraudulently obtaining money from the Lodge as a result of the receipt of the bingo permit, but that he was guilty of various income tax violations. It has been held that such evidence is potentially quite prejudicial and, "likely to emphasize all of the criminal charges to the jury." Aetna Cas. and Sur. Co. v. Gosdin, 803 F. 2d 1153 (11th Cir. 1986). The Eleventh Circuit ruled that courts should apply the same standard of harmless error for civil and criminal cases, and follow the standard enunciated in Kotteakos v. United States, 328 U.S. 750 (1946):

> But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.
>
> Id., at 1159

The Aetna case vacated the judgment in question because, "(W)e cannot say with fair assurance that the judgment was not substantially swayed by the impermissible

evidence. Id., at 1160. The nature of the allegations against that Defendant (pimping, pandering and drug distribution) and their lack of relevance to the facts at issuein the case led the Court to conclude that it was error to have admitted testimony about them. Id., at 1159.

The Defendant submits that the Sixth Circuit should have further relied on the rationale utilized in cases where there has been a variance between the indictment and proof, and determined whether his substantial rights were affected. Berger v. United States, 295 U.S. 78 (1935); United States v. Richerson, 833 F. 2d 1147 (5th Cir. 1987); United States v. Adams, 759 F.2d 1099 (3rd Cir. 1985). Richerson outlined a two-prong test to determine whether substantial rights are affected: 1) Did it cause surprise at trial?, or 2) did it leave the Defendant vulnerable to a later prosecution because of a failure to make

clear the offense for which he had been tried? Richerson, at 1155. That Court held that, "The most common prejudice to a substantial right resulting from a variance is transferrence of guilt." Id. As heretofore mentioned, the testimony of Smith, his employees and other permit-holders was unanticipated in light of the charges contained in the indictment, and moreover, it left the Defendant vulnerable to a later prosectuion on tax and breach of fiduciary charges, all of which seriously undermined his credibility.

Finally, the Defendant would submit that the proof at trial relating to all charges and uncharged offenses was inextricably related and, that as a result, it is inconceivable the jury did not rely on the improper material contained in the indictment, the proof adduced at trial in connection therewith, and the improper instruction by the Court. Where doubt

exists as to whether the conviction was predicated on permissible or impermissible grounds, that doubt must be resolved in the Defendant's favor and the conviction must be overturner. Ingber v. Enzor, 664 F. Supp. 814, 821 (S.D.N.Y. 1987), relying on Stromberg v. California, 283 U.S. 359 (1931); United States v. Orozco-Prada, 732 F.2d 1076 (2nd Cir.), cert. denied, 469 U.S. 845 (1984); United States v. Ruggiero, 726 F.2d 913 (2nd Cir.), cert. denied, 469 U.S. 831 (1984).

3. Did the Sixth Circuit Court of Appeals err in failing to find that the Defendant's perjury conviction should be overturned on the ground that he responded with the literal truth?

The Defendant submits that the Sixth Circuit erred in failing to find his responses were literal truth by following the criteria set forth by the Fifth Circuit Court of Appeals in United States v. Dudley, 581 F.2d 1193 (5th Cir. 1978); United States v. Abrams, 568 F.2d 411 (5th Cir.), cert. denied, 437

U.S. 903 (1978). That Circuit held that a defendant may not be convicted of perjury if the response is literally true, even if the response is evasive, non-responsive, intentionally misleading or arguably false by negative implication.

The Defendant submits that his testimony before the Grand Jury and the testimony and evidence adduced during the trial of this cause reflect that his responses met the Fifth Circuit criteria of Dudley and Abrams, and thus the Sixth Circuit erred in failing to vacate that conviction.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas E. Hansom, do hereby certify that three copies each of the foregoing Petition for A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was mailed, postage prepaid, to Solicitor General, Department of Justice, Washington, D.C. 20530, Mr. W. Hickman Ewing, Jr., United States Attorney, 1026 Federal Office Building, Memphis, Tennessee 38103, and Mr. Joseph C. Wyderko, Attorney at Law, Department of Justice, Criminal Division/Appellate Section, Post Office Box 899, Ben Franklin Station, Washington, D. C. 20044-0899, on this the 3rd day of August, 1988.

THOMAS E. HANSOM

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See. Sixth Circuit Rule 24

No. 86-6025

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
IRA HENDERSON MURPHY,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed January 4, 1988

Before: KEITH, Circuit Judge; PECK, Senior Circuit Judge; and DOWD, District Judge.*

DOWD, District Judge

Defendant-appellant Ira Henderson Murphy was convicted of eleven counts of mail fraud in violation of 18 U.S.C. § 1341, one count of obstruction of justice in violation of 18 U.S.C. § 1503, and one count of perjury before a federal grand jury in violation of 18 U.S.C. § 1623. The defendant received a sentence of five years imprisonment for each of the thirteen counts to be served concurrently and was also

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*The Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

fined $5,000 in connection with the conviction for obstruction of justice.

FACTUAL BACKGROUND

The defendant's convictions relate to his conduct in subverting the statutory scheme adopted by the Tennessee legislature in 1971 whereby non-profit organizations were allowed, upon application and issuance of a Certificate of Registration, to conduct bingo games for charitable purposes. The bingo licenses were processed by the Charitable Solicitation Division of Tennessee's Secretary of State Office. The defendant served in the Tennessee legislature and sponsored the legislation he subsequently manipulated by supervising the successful application of an inactive Masonic Lodge for a bingo license.

In 1982, the defendant, then a Judge of the Court of General Sessions in Memphis, Tennessee, engaged in a series of mailings to the Tennessee authorities designed to bring about the issuance of a bingo license for the H.D. Whalum Lodge No. 373. Pursuant to the state statutory scheme, the defendant provided documentation that the Lodge was tax exempt under § 501(c)(3) of the Internal Revenue Code asserting that no member of the sponsoring organization would receive profits from the bingo game, that all members conducting the bingo games were members of the sponsoring organization and had been a member for one year. The information provided by the defendant was untrue.

The initial application bore the signature of "Charles Brooks" as the person signing the application on behalf of the Lodge. The defendant notarized the signature. Subsequent renewals for the Lodge were processed and filed and included names of members active in the Lodge, even though the Lodge continued to be an inactive organization. Renewal licenses were issued and eventually the defendant permitted Ronald Smith to use the Lodge license to operate a bingo

game. While Smith operated the bingo game using the Lodge license, he paid the defendant $200 a week for the use of the license. Eventually, Postal Inspector Faulkner and Special Agent Briscoe of the I.R.S. began an investigation of Ronald Smith as an operator of a bingo game in Memphis. Their interest focused, in part, on the Whalum Lodge bingo license. As a consequence, they attempted to locate Charles Brooks as he appeared to be the primary person involved in the Whalum Lodge application. Unable to locate Brooks, Faulkner and Briscoe sought the assistance of the defendant as his name appeared as the notary on the initial application.

Faulkner and Briscoe also questioned the defendant about his possible involvement in the operation of the Whalum Lodge bingo game and the defendant denied any misconduct. The agents then located and interviewed Brooks. He denied membership in the Whalum Lodge, and denied the authenticity of his purported signatures on the Whalum Lodge applications and reports to the state. Brooks also informed the agents that he had been contacted by the defendant who had solicited his cooperation in leading the investigators and the grand jury away from the defendant's personal involvement in the bingo operation. Brooks also indicated that he had been offered $7,000 by the defendant for his cooperation. Eventually, with Brooks' consent, his conversations with the defendant were taped. In those conversations the defendant sought Brooks' cooperation and promised the payment of the $7,000.

Subsequently, the defendant appeared before the federal grand jury and after being informed that he was a subject of the investigation, denied any knowledge that signatures on documents submitted to the Tennessee authorities in support of the application for the bingo license for the Whalum Lodge were forgeries.

I. THE INDICTMENT FAILS TO CHARGE MAIL FRAUD VIOLATIONS (18 U.S.C. § 1341) IN LIGHT OF McNALLY v. UNITED STATES.

We first address the issues relating to the convictions for mail fraud in light of the significant change in mail fraud prosecution occasioned by *McNally v. United States*, _ U.S. _, 107 S. Ct. 2875 (1987).[1] Prior to *McNally*, numerous circuit court of appeals decisions[2] interpreted the mail fraud statute broadly and affirmed convictions involving schemes to defraud governments (local, state and federal), employers, unions, and citizens, of what are now commonly referred to as "intangible rights." Although § 1341[3] reads in the disjunctive, *McNally* holds that § 1341 must be read as limited in scope to the protection of property rights. In *McNally*, the Court compared the mail fraud statute with 18 U.S.C. § 371, which proscribes a conspiracy to defraud the United States and which has been interpreted broadly in its application,[4] and declared

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[1]The decision in *McNally* was issued June 24, 1987. The briefs of the parties in this case had been filed previously. The case was argued before this Court on August 4, 1987. Following the argument, the Court directed postargument briefs be filed responding to issues perceived by the Court in light of *McNally*.

[2]Justice Stevens' dissent contains a listing of numerous such decisions. *See McNally*, 107 S. Ct. at 2883 footnotes 1-4.

[3]18 U.S.C. § 1341 provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,. . .,for the purpose of executing such scheme or artifice or attempting so to do, [uses the mails], shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[4]*See, e.g., Glasser v. United States*, 315 U.S. 60 (1942) and *Haas v. Henkel*, 216 U.S. 462, 480 (1910).

> Section 371 is a statute aimed at protecting the Federal Government alone: however, the mail fraud statute, as we have indicated, had its origin in the desire to protect individual property rights, and any benefit which the Government derives from the statute must be limited to the Government's interest as property-holder.

McNally, _ U.S. at _, 107 S. Ct. at 2881 n.8 (1987).

Recent decisions of the Fifth and Seventh Circuit, in the wake of *McNally*, underscore the proposition that a mail fraud prosecution is limited to allegations of fraud involving money or property. In *United States v. Herron*, 816 F.2d 1036, reconsidered and vacated in 825 F.2d 50 (5th Cir. 1987) the court reconsidered *sua sponte* whether the facts alleged in the indictment constituted a cognizable violation of the wire fraud statute, 18 U.S.C. § 1343, and answering the question in the negative withdrew its previous opinion finding that the indictment did allege an offense in light of *McNally*.

After determining that the mail fraud and wire fraud statutes required an identical analysis in terms of "intangible rights," the *Herron* court held that a money laundering scheme designed to prevent the filing of Currency Transaction Reports (CTR)[5] failed to satisfy the "money or property" requirement of *McNally*.

In *United States v. Gimbel*, 830 F.2d 621, 41 Cr. L. 2403 (7th Cir. 1987), the defendant's conviction for mail fraud based on a scheme of depriving the Treasury Department

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[5]A financial institution is required to file a CTR on "each deposit, withdrawal, exchange of currency. . .or transaction in currency of more than $10,000." 31 C.F.R. § 103.22(a)(1); *see* 31 U.S.C. § 5313(a). The CTR filing is designed to provide the government with a "paper trail" in order to follow the unusual movement of large amounts of money. See *California Bankers Assn. v. Shultz*, 416 U.S. 21 (1974).

of Currency Transaction Reports and of other "accurate and truthful information and data" was vacated upon the finding that the indictment did not state an offense because it did not charge that the scheme deprived the Treasury Department of money or property.

United States v. Fagan, 821 F.2d 1002 (5th Cir. 1987) announced just six days after the *McNally* decision, affirmed a conviction for mail fraud where the underlying scheme involved the payment of a kickback by the defendant to an employee of a company who was renting boats for use of off-shore drilling operations from the defendant. In footnote six of that opinion, the court acknowledged the *McNally* decision and opined:

> We believe that there is sufficient evidence that the scheme here was one to deprive Texoma of its property rights, viz: its control over its money, as it parted with its rental payments on the basis of a false premise; the economic value of possibly being able to rent the boats from Fagan for less, had it known he was willing to accept less; its right to the kickbacks Riley received from Fagan.

Fagan, 821 F.2d at 2611 n.6.

The predicate for a mail fraud violation is a "scheme or artifice" to defraud. *United States v. Rabinowitz*, 327 F.2d 62, 76-77 (6th Cir. 1964). Thus, we next consider whether the scheme and artifice alleged in the indictment as the predicate for the eleven counts of mail fraud described conduct which is now prohibited by 18 U.S.C. § 1341 in the wake of the narrowing of the scope of that statute by *McNally*.

The lengthy indictment described the scheme and artifice as "to defraud the State of Tennessee of the right to issue certificates of registration to charitable organizations to conduct bingo games, based on complete, true and accurate

information to be provided by those applying for said permits."[6]

The defendant argues, in light of *McNally*, that no testimony was offered nor was any claim advanced that Tennessee was deprived of any money or property by the alleged fraudulent conduct of the defendant. Rather, the defendant argues the scheme charged in the indictment describes an intangible right, i.e., Tennessee's right to accurate information with respect to its issuance of certificates of registration (i.e., bingo permits) to charitable organizations.

The government disagrees with the defendant's characterization of the indictment in this case. In support of its claim that the defendant's mail fraud convictions survive the *McNally* limitation to schemes involving money or property, the government advances the argument that the certificate of registration (i.e., the bingo license) is a property right. Building on that contention, the government cites *United States v. Schilling*, 561 F.2d 659, 662 (6th Cir. 1977) and *United States v. Fischl*, 797 F.2d 306, 311-12 (6th Cir. 1986) for the proposition that the "right to object" is an ancillary property right, inseparable from the existence of ownership. The government also asserts the opinion in *Fagan*, supports its analysis.

In *Schilling* and *Fischl* the right to object or the right to control, was not labeled as a property right, but rather as we read the cases, as examples of what *McNally* would describe

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[6]Count I through Count XI of the Indictment charged separate mail fraud violations. Count XII charged obstruction of justice and Count XIII charged perjury. Counts II through XI reallege the allegations contained in paragraphs A and B of Count I. Sub-paragraphs 1 - 20 under paragraph B of Count I sets forth in substantial detail the means by which the scheme and artifice described in the first paragraph of paragraph B was carried out Sub-paragraphs 1 - 7 under paragraph A and the first paragraph under paragraph B and paragraph C of Count I and Counts XII and XIII are set forth in the appendix to this opinion.

as "intangible rights." In *Schilling*, the defendant, a member of the Shelby County Quarterly Court (a legislative body), had acquired an interest in property located within a flood control project. The property was subsequently offered for sale to the Chickasaw Basin Authority at a much higher proposed sale price and was conditioned upon the Quarterly Court approving and appropriating the purchase money. Thereafter, when the issue of the defendant's possible interest in the property surfaced, he falsely advised the Quarterly Court that he had divested himself of all interest in the property and would gain nothing from the approval of the sale. In fact, the defendant did not divest and realized a substantial profit from the Quarterly Court's approval. Count one of the indictment charging a mail fraud violation, as set out in the court's opinion, alleged in part:

> * * * devised and intended to devise a scheme and artifice to defraud (a) the consistency [sic] of defendant, BILLY RAY SCHILLING, whose interest he had been duly elected to represent * * * of their right to his conscientious, loyal, faithful and unbiased services * * * free from partiality, wilful omission * * * inconsistent with the interests of his constituency * * * (b) the constituency of fellow-elected members of defendant, BILLY RAY SCHILLING * * * and the fellow-elected members of defendant, BILLY RAY SCHILLING, themselves by affirmatively misrepresenting a material fact to them so as to cause said fellow-elected members to exercise their judgment in a matter pending before them * * * thereby denying to the fellow-elected members their right to rely on the truth of material representation made by a fellow-elected member * * * and their right to faithfully perform their duties and responsibilities to their constituents unfettered by dishonesty on the part of a fellow member.

Schilling, 561 F.2d at pp. 661-62 (omissions in the original).

The dismissal of the first count was reversed on appeal with the holding that:

> Count one of the indictment alleges in effect that this scheme caused the members of the County Court to act favorably on the sale of the land and the appropriation of the money for its sale to the Chickasaw Basin Authority. The plain inference is that it caused the members of the Court to surrender their right to object to the sale which they obviously would have done as indicated by their previous action in cancelling the sale.

Schilling, 561 F.2d at 662.

It is readily apparent that the first count of the indictment was anchored in the intangible right of the defendant's constituency to his conscientious, loyal, faithful and unbiased services. Thus, the *Schilling* reference to the "right to object" is with reference to an intangible right, not to a property right as claimed by the government.

In *Fischl*, also a pre-*McNally* opinion regarding a mail fraud conviction, the defendant's elaborate kickback scheme was found to be in violation of the mail fraud statute. The *Fischl* court reasoned that the defendant, notwithstanding the fact that the defendant contemplated delivering marine vessels at the agreed contract price to the State of Michigan, intended to cheat the Michigan legislature out of information which, if known, would have prevented an appropriation of the balance of money needed to complete the project. The evidence supported a determination that the defendant, by the kickback scheme, intended to cheat the Michigan transportation officials out of information to which they would have been entitled under the contract.

The *Fischl* court applied the reasoning of *Schilling* as it discussed the "right to object" stating:

> the *Schilling* case did involve false representations, and as in the case at bar, the false representations

were made to public officials. The defendants in *Schilling* contracted to sell property to a public authority that could not purchase it without the approval of a legislative body of which one of the defendants was a member. The defendants falsely represented that the member in question had divested himself of his interest in the property. This court, held it was error to dismiss the indictment: notwithstanding that the property might have been worth every penny that the public authority paid for it, there would be a criminal violation if, as alleged in the indictment, the members of the legislative body had been caused "to surrender their right to object to the sale." If the defendants defrauded the legislators of their "right to object," they committed "actual fraud" within the meaning of *Epstein*.

Applying the logic of *Schilling* to the case at bar, it is clear that at the very least Mr. Fischl defrauded the State of its right to terminate the UPSCO contract. Untrutaful "lulling letters" of the sort for which Mr. Fischl was responsible, and which in this case induced the State to continue funding the UPSCO project, have repeatedly been held sufficient to support mail fraud conviction. *United States v. Ashdown*, 509 F.2d 793, 800 (5th Cir.), *cert. denied*, 423 U.S. 829, 96 S.Ct. 48, 46 L.Ed.2d 47 (1975); *United States v. MacClain*, 501 F.2d 1006, 1012 (10th Cir. 1974).

Fischl, 797 F.2d at 312.

The "right to terminate" addressed in *Fischl* is closely analogous to the "right to object" in *Schilling*, and we are convinced that *Fischl* similarly fails to support the government's argument.

Mindful of the implied suggestion in *McNally*, (see, *McNally*, _ U.S. at _, 107 S. Ct. at 2875-76), that the concept

of property rights are to be given a liberal interpretation,[7] we find that the issue with respect to the question of whether the scheme and artifice as described charges a mail fraud violation under the *McNally* limitations, distills to a consideration of whether Tennessee's "right to control or object" with respect to the issuance of a bingo permit to a charitable organization constitutes "property." The eighth footnote in *McNally* is instructive, as it concludes with the declaration, "the mail fraud statute, as we have indicated, had its origin in the desire to protect individual property rights, and any benefit which the government derives from the statute must be limited to the Government's interests as property-holder." *McNally*, _ U.S. at _, 107 S. Ct. at 2881 n.8. In our view, the certificate of registration or the bingo license may well be "property" once issued, insofar as the charitable organization is concerned, but certainly an unissued certificate of registration is not property of the State of Tennessee and once issued, it is not the property of the State of Tennessee. In sum, we find that Tennessee's right to accurate information with respect to its issuance of bingo permits constitutes an intangible right and thus the scheme and artifice as charged

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[7]As an example of a liberal interpretation, see the recent decision of the Supreme Court in *Carpenter v. United States*, __ U.S. __, 108 S.Ct. 316 (1987). Winans, a co-defendant in the *Carpenter* case, wrote a column for the Wall Street Journal entitled "Heard on the Street." The column discussed selective stocks or groups of stocks, giving positive and negative information about those stocks and taking a point of view with respect to investment in the stocks. Contrary to the policy of the Wall Street Journal, Winans repeatedly gave the co-defendants advance information about the substance of up-coming columns and the co-defendants used that information to invest in the stocks mentioned in the column with a resulting profit of $690,000 in which Winans shared. The Court held that the Wall Street Journal's business information that it intended to be kept confidential until the publication of the column constituted a property right in the context of prosecutions for violations of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343.

in the indictment in support of the eleven counts of mail fraud does not state a crime 18 U.S.C. § 1341 as narrowed by *McNally*. So finding, the convictions for the eleven counts of mail fraud must be dismissed.[8]

II. EVEN ASSUMING THE INDICTMENT FOR MAIL FRAUD SURVIVES McNALLY INSPECTION, THE CONVICTIONS CANNOT BE SUSTAINED IN LIGHT OF THE COURT'S CHARGE TO THE JURY.

The second issue arising from the mail fraud convictions also emerged in the post-argument briefs and relates to the district court's charge to the jury. The scheme and artifice to defraud was described with respect to mail-fraud counts in the indictment in the district court's charge to the jury in relevant part as follows:

> The words scheme and artifice as used in this statute include any plan or course of action intended to deceive others and obtain by fraud or fraudulent pretenses, representations privileges granted by the State of Tennessee, including bingo permits, or money, from the person so deceived.

Tr. p.1446 - lines 20-25.

> Two essential elements are required to be proved in order to establish the offenses charged in the first eleven counts of the indictment.
>
> First, that the defendant willfully and knowingly devised a scheme or artifice to defraud, *or to obtain money* or the privilege of operating a bingo game by means of false pretenses, representations or promises.

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[8]The defendant-appellant has claimed that the evidence of mailing or causing to be mailed was insufficient as to a number of the mail fraud counts. We see no need to consider that issue based upon our holding that the indictment failed to allege a § 1341 violation.

Tr. p. 1447 - lines 12-18 (emphasis added).

In sum, the district court advised the jury that the defendant was guilty of the mail fraud counts if the jury found that the scheme or artifice was "*to obtain money*. . .by means of false pretenses, representations or promises." *Id.* (emphasis added). However, that particular scheme or artifice was not charged in the indictment. The predicate for a mail fraud violation is a "scheme or artifice" to defraud a person or entity of its money or property. The government argues that the jury could have found such an artifice or scheme to obtain money proven by the evidence and thus, the defendant's convictions should be affirmed.

It is the purpose of the indictment to frame the charge which the defendant is obliged to meet. *Russell v. United States*, 369 U.S. 749 (1962). It is well established that when the Court, by its jury charge, changes the crime from that for which the defendant was indicted, a subsequent guilty verdict must be vacated. *Stirone v. United States*, 361 U.S. 212 (1960); *Cf. United States v. Miller*, 471 U.S. 130 (1985); *United States v. Runnels*, Nos. 86-1922, 86-1923, slip op. (6th Cir. Oct. 19, 1987). Consequently, if we are incorrect in holding that the mail fraud indictments fail to state a crime by reason of the *McNally* holding, nonetheless, the district court's jury charge broadening the scope of the indictment by requiring the defendant to defend against an uncharged scheme or artifice to obtain money by false pretenses, representations or promises would necessarily require that the mail fraud convictions be vacated and remanded for further proceedings.

However, holding to the view that the mail fraud counts fail to charge a crime under *McNally*, the defendant's convictions of the eleven counts of mail fraud are dismissed.[9]

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[9]The government's supplemental brief filed on October 26, 1987 relies heavily on *United States v. Wellman*, 830 F.2d 1453 (7th Cir.

III. THE CONVICTIONS FOR OBSTRUCTION OF JUSTICE AND PERJURY.

In light of *McNally* and in anticipation of a ruling holding that the indictment failed to state a post-*McNally* mail fraud violation, the defendant argues that his convictions for obstruction of justice and perjury are tainted by the "spillover" effect of the testimony advanced in support of the mail fraud violations and should be set aside. We disagree.

Federal Rules of Criminal Procedure 8(a) provides for joinder of offenses "if the offenses charged,. . .are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Relief from prejudicial joinder of defendants or offenses is required by Federal Rules of Criminal Procedure 14. Initially we note that the defendant did not claim misjoinder under Fed. R. Crim. P. 8 or request Fed. R. Crim. P. 14 relief from the joinder of the mail fraud counts with the additional counts of obstruction of justice and perjury.

The indictment did charge mail fraud violations that would have passed muster prior to *McNally*. Overwhelming proof was presented of the defendant's commitment to the scheme and artifice charged in the indictment. The government pro-

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1987), for support of its proposition that notwithstanding the variance between what is charged in the indictment and what was charged to the jury, sufficient evidence was presented for a finding of a violation of the mail fraud statute. The *Wellman* decision is distinguishable from the case at bar in that the indictment here, as indicated earlier, charges a violation of only an intangible right whereas in *Wellman* the indictment, taken as a whole by the circuit court, alleged a violation of a property right. The indictment here, in its broadest sense, cannot be said to allege a violation of a property right. Furthermore, we decline to look through the indictment to the substantive allegations and determine that the indictment alleges a crime under *McNally* given the strong policy of not requiring an accused to defend an additional charge not set out in the indictment. *Stirone v. United States*, 361 U.S. 212 (1960).

ceeded lawfully in its investigation of the defendant's conduct. The jury was presented with evidence which clearly supported the convictions for obstruction and perjury, both extremely serious crimes, particularly for one who has sought and obtained the right to sit in judgment of the conduct of others in his role with the judiciary. Had the defendant sought and obtained a severance of the obstruction and perjury charges from the mail fraud charges, the evidence of defendant's conduct which formed the basis of the mail fraud prosecutions would have been admissible under the provisions of Evidence Rule 404(b) to set in proper perspective the defendant's conduct as it related to the obstruction and perjury charges. *United States v. Lane*, 474 U.S. 438, 450 (1986).

In the main, "spillover" defenses are raised in the aftermath of a denied defense motion for a severance. With the advent of criminal prosecutions for RICO violations (18 U.S.C. § 1962(c)), courts have examined the issue of whether the effect of a RICO violation subsequently dismissed before the jury began deliberating on other charges has a "spillover" effect tainting the remaining convictions, in light of the "racketeer" label attached to the dismissed RICO count. *United States v. Stefan*, 784 F.2d 1093, 1101 (11th Cir. 1986); *United States v. Kabbaby*, 672 F.2d 857, 861-62 (11th Cir. 1982); *United States v. Guiliano*, 644 F.2d 85, 89 (2nd Cir. 1981).

In seeking a ruling setting aside the obstruction and perjury convictions, the defendant urges the Court to adopt and apply in this case the two-step test adopted by the Eleventh Circuit in *United States v. Stefan*, 784 F.2d 1093 (11th Cir. 1986) to determine whether the "spillover" effect of the "racketeer" label requires reversal. The *Stefan* test consists of two questions:

1. Did the jury meticulously sift the evidence?

2. Was the defendant prejudiced by a spillover of evidence relating to the other counts?

Stefan, 784 F.2d at 1101.

We decline to adopt the *Stefan* test. We find the "meticulously sifting" test difficult to apply. The defendant asserts that the fact that the jury deliberated in this case for less than an entire day negates a finding that the jury engaged in a "meticulous sifting" of the evidence. In our view, the "meticulous sifting" test is one designed for rank speculation as to what occurred in the privacy of the jury room during deliberations.

We continue to adhere to the principles of *United States v. Swift*, 809 F.2d 320 (6th Cir. 1987) which addressed the effect of "spillover" in the context of the defendant's failure to request a severance and where the court declared that to cause error by a "spillover" effect with respect to a trial of several defendants, the defendant moving for a severance "must demonstrate an inability of the jury to separate and treat distinctively evidence relevant to each particular defendant." *Swift*, 809 F.2d at 322. The same analysis applies where the defendant claims a "spillover" effect with respect to counts for which a dismissal is ordered as the proof of the dismissed counts might prejudicially "spillover" on to the remaining convictions. While related with respect to motive, the mail fraud charges constituted conceptually a totally separate type of crime from that of obstructing justice and perjury. In sum, we find no prejudicial "spillover" effect requiring a vacation of the convictions for obstructing justice and perjury and those convictions are affirmed.

IV. CONSIDERATION OF ERRORS CLAIMED BY THE DEFENDANT IN THE FIRST BRIEF FILED PRIOR TO McNALLY.

A.

The defendant's motion to dismiss the indictment based upon his assertion that he had been singled out for selective

prosecution is without merit. The defendant bears the burden of demonstrating that the trial court's denial of the motion was clearly erroneous. *United States v. Bohrer*, 807 F.2d 159, 161 (10th Cir. 1986). The test for a selective prosecution defense, as established by *United States v. Hazel*, 696 F.2d 473, 474-75 (6th Cir. 1983) requires as the first step that the defendant was singled out for prosecution while others similarly situated were not charged. The investigation which led to the defendant's demise initially focused on the conduct of Ronald Smith. He, like the defendant, was indicted, convicted and sentenced to prison. The defendant was, therefore, not singled out for prosecution.

B.

The defendant's initial brief challenged the sufficiency of the evidence. As we have vacated and held void the convictions for mail fraud, an examination of the sufficiency of the evidence with respect to whether certain documents were received by way of the mails is unnecessary. The defendant's attacks upon the sufficiency of the evidence on the obstruction of justice and perjury charges are without any merit.

C.

No consideration of the third error is necessary as it relates to challenged evidentiary rulings relating to the mail fraud convictions.

D.

Following his conviction, the defendant sought permission from the trial court to question juror Stover to determine if Stover's plans to leave on a vacation had affected his deliberations. The request was correctly denied on the authority of Rule 606(b) of the Federal Rules of Evidence which limits inquiry of jurors into the validity of a verdict and expressly prohibits such an inquiry as to "effect of anything upon his

or any other juror's mind or emotions as influencing him to assent or to dissent from the verdict."

CONCLUSION

The convictions and sentence of the defendant for obstruction of justice and perjury are affirmed. The convictions and sentences of the defendant for the eleven counts of mail fraud are vacated and this case is remanded for an entry of dismissal of the eleven counts of mail fraud.

APPENDIX

INDICTMENT

THE GRAND JURY CHARGES:

COUNT 1

A. That at all times material to this indictment

1. The defendant IRA HENDERSON MURPHY was an attorney in Memphis, Tennessee. Commencing in September 1982, the defendant Murphy became an elected General Sessions Court Judge for Shelby County, Tennessee [sic]

2. Under Tennessee law charitable organizations soliciting funds had to register with the Secretary of State of Tennessee. Charitable organizations exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code of 1954, as amended, could conduct bingo games providing certain conditions were met. No part of the gross receipts derived from bingo games could inure to the benefit of any member or employee of the organization. The conduct of the bingo games was to be strictly according to certain requirements, including, but not limited to:

The organization had to be exempt from tax under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended; persons conducting the games on behalf of organizations had to be members in good standing of the organization for not less than one year; the organization had to have been in existence for at least 5 years; and bingo games could be conducted only at the place of the organization's domicile. Prior to conducting bingo games, the Secretary of State had to give permission following a registration process which was to ensure compliance with the law.

3. An initial application for a registration statement had to be made with the State by a charitable organization seeking to conduct bingo games in accordance with Tennessee law.

An application had to be completed, which contained certain information, including, but not limited to: the name of the organization; its principal address; location of bingo game; whether funds in excess of $5,000 or $10,000 would be received during the registration period; whether or not the organization had received a tax exemption from the Internal Revenue Service; for what purpose contributions would be used; names and addresses of persons having responsibility for the custody and distribution of contributions; the names and addresses of the bank into which funds received would be deposited and the persons authorized to write checks on that account; and the names and addresses of the persons conducting the games (indicating the length of time the member has been in good standing of the organization). This application form had to be certified by the president and/or executive director of the organization that the information was complete, true and correct. The person authorized to disburse funds pursuant to Tennessee law was also required to sign this application.

4. Once an organization had been given permission to conduct bingo games, it was required that they file an annual accounting form, along with their application form. The accounting form had to list information about the bingo operation, including, but not limited to: Total amount of receipts, cost of prizes, gross receipts (receipts less cost of prizes), necessary and reasonable costs/expenses, proceeds, and the names of recipients of proceeds. This annual accounting form had to be signed and notarized by the person authorized to make disbursements of the proceeds.

5. The Most Worshipful Prince Hall Grand Lodge of Free and Accepted Masons of Tennessee had its state headquarters in Memphis, Tennessee. On September 10, 1956, a Lodge designated as H. D. Whalum Lodge F&A.M. No. 373 was opened in Memphis, Tennessee. The H. D. Whalum Lodge No. 373 was closed in November 1963. It was reactivated

in April 1979, remaining in operation until August 1981. It has remained closed since that time.

6. Ronald J. Smith operated a bingo game at 4128 South Plaza Drive, Memphis, Tennessee. Smith had conducted a bingo game at this location on a substantially continuous basis since on or about 1972. Smith operated the bingo games under the sponsorship of three different organizations during the period of this indictment, that is, the A. Phillip Randolph Institute, the Citywide Community Council, and the H. D. Whalum Lodge #373.

7. Dean White III was an attorney in Memphis, Tennessee who at different periods of this indictment represented Ronald J. Smith and the other sponsoring organizations.

B. From on or about November 16, 1982, until on or about May 15, 1985, the exact date to the grand jury unknown, in the Western District of Tennessee, the defendant,

- - - - - - - IRA HENDERSON MURPHY, - - - - - - -

being aided, abetted and counseled by persons known and unknown to the grand jury, knowingly, wilfully and unlawfully devised and intended to devise a scheme and artifice to defraud the State of Tennessee of the right to issue certificates of registration to charitable organizations to conduct bingo games, based on complete, true and accurate information to be provided by those applying for said permits.

The scheme and artifice to defraud by means of false and fraudulent pretenses and representations, so devised and intended to be devised by the defendant and others, was in substance as follows:

* * *

C. On or about November 15, 1982, in the Western District of Tennessee, the defendant,

- - - - - - - IRA HENDERSON MURPHY - - - - - -

for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to so do, did knowingly cause to be placed in an authorized depository for mail matter, to be sent and delivered by the United States Postal Service according to the directions thereon, an envelope, said envelope containing, among other things, a letter from the defendant Murphy to the Director, Charitable Solicitations, Office of the Secretary of State, Nashville, Tennessee, and supporting documentation, including an application for a registration statement to operate a bingo game; in violation of Title 18 United States Code, Sections 1341 and 2.

COUNT XII

From on or about June 7, 1985, to on or about June 12, 1985, in the Western District of Tennessee, the defendant,

- - - - - - - IRA HENDERSON MURPHY - - - - - - -

did knowingly, intentionally and unlawfully influence, obstruct, and impede and endeavor to influence, obstruct, and impede the due administration of justice by attempting to influence the testimony of Charles Brooks before a federal grand jury then impanelled and sitting in the Western District of Tennessee, said grand jury conducting an investigation into bingo operations of Ronald J. Smith; the role of the H. D. Whalum Lodge No. 373 and the sponsorship of said bingo operation; and the roles of those persons listed on the H. D. Whalum Lodge No. 373 bingo applications, including Charles Brooks and Ira Henderson Murphy; in violation of Title 18 United States Code Section 1503.

COUNT XIII

1. On or about June 18, 1985, in the Western District of Tennessee, at Memphis, IRA HENDERSON MURPHY, while under oath as a witness in an investigation then being conducted by the grand jury for the Western District of Tennessee, knowingly did make materially false declarations, that is to say:

2. At the time and place aforesaid, the grand jury was engaged in an investigation which involved certain bingo operations being conducted in the City of Memphis, and whether or not certain federal criminal statutes, including, but not limited to, the illegal gambling business statute, the Mail Fraud statute, the Wire Fraud statute, and violations of the Internal Revenue Code had taken place.

3. It was a matter material to this investigation to determine whether IRA HENDERSON MURPHY had participated in any illegal gambling operations involving bingo, whether he had participated in certain fraudulent activities in obtaining or renewing permits from the State of Tennessee to operate bingo games, and whether IRA HENDERSON MURPHY had participated in violations of the Internal Revenue Code. It was a matter further material to the investigation to determine exactly Murphy's role in having the H. D. Whalum Lodge No. 373 sponsor and operate bingo games at 4128 Sout Plaza Drive, and whether or not Murphy had forged or caused to be forged certain signatures on documents submitted to the State of Tennessee or on documents utilized at the bingo operation at 4128 South Plaza Drive.

4. At the time and place aforesaid, IRA HENDERSON MURPHY while under oath, did knowingly declare in part before the grand jury in regard to this material matter as follows:

Q. Was Mr. Smith a member of the H. D. Whalum Lodge?

A. Who is that; Ronnie Smith?

Q. Yeah.

A. No, sir.

Q. Was he supposed to be a member in order to run the bingo?

A. I would have to—the statute speaks for itself on that, Mr. Ewing.

Q. I think you know what the statute provides.

A. I wouldn't be so sure about that.

Q. Did you have anything to do with making out membership cards for anybody?

A. The membership applications, other than securing them, but that was about all. No, I didn't have anything specifically to do with the cards per se.

Q. Well, let me show you one of these little yellow cards that says the H. D. Whalum Lodge Auxiliary Committee, have you ever seen one of those?

(Thereupon, the above-described [sic] card was passed to the witness.)

A. No, sir.

Q. You have never seen one of those cards?

A. I don't have any recollection of ever seeing one. It shocks me when I see that.

Q. Do you know Charles Brooks?

A. Yes, sir.

Q. Do you know whether he signed those cards?

A. I wouldn't know.

Q. Mr. Murphy, do you have any knowledge where any signatures on any documents submitted to the State are forgeries?

A. Not to my knowledge. I am standing behind my privilege, but not to my knowledge have I known of any signatures that were forgeries.

Q. You say that you are standing behind your privilege.

A. Yes, sir. I don't know of any forged signatures being submitted to the State.

5. The aforesaid declaration by IRA HENDERSON MURPHY as set forth in paragraph 4 of this count contained materially false declarations, which were known by the defendant to be false when made in that IRA HENDERSON MURPHY had had something to do with yellow cards bearing the name H. D. Whalum Lodge #373 Community Service Auxiliary Committee, in that he had signed the name "Charles Brooks" on the membership cards of persons working at the bingo operation at 4128 South Plaza Drive; and in that he knew that Charles Brooks had not signed the cards, because he had signed them himself; and in that he knew that a document bearing a forged signatures [sic] of "Charles Brooks" had been submitted to the State of Tennessee; in violation of Title 18, United States Code, Section 1623.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA

VS. 85-20246-01-M

IRA HENDERSON MURPHY

ORDER ON JURY VERDICT

This cause came on for trial on June 30, 1986, the United States Attorney for this district representing the government and the defendant appearing in person and with counsel T. E. Hansom who was retained to represent the deft.

After listening to all of the evidence, arguments of counsel, and charge of the Court, the jury began its deliberation on July 10, 1986. After due deliberation, the jury returned into open court on July 11, 1986 and announced its verdict of GUILTY as to the thirteen (13) count indictment.

The case is to be set for disposition at a later date upon completion of the presentence report and in the meantime the

defendant may remain on his present ROR bond.

ENTERED this the 16th day of July, 1986.

Robert M. McRae, Jr., Judge
United States District Court

W. Hickman Ewing, Jr.
United States Attorney

This document entered on docket sheet in compliance with Rule 55 and/or 32(b) FRCrP on 7-17-86.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NO. 86-6025

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

IRA HENDERSON MURPHY,
Defendant-Appellant.

Before: KEITH, Circuit Judge; PECK, Senior Judge; and DOWD, District Judge.

J U D G M E N T

ON APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOØF, It is now here ordered and adjudged by this court that the judgment of the said district courtin this case be and the same is hereby affirmed in part, vacated in part, and the case is remanded consistent with this opinion.

No costs taxed.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

Clerk

Issuedas Mandate: Ø6/1Ø/88 A True Copy.

COSTS: NONE Attest:

Deputy Clerk

APPENDIX D

No. Ø6-6Ø25
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF MERICA,

Plaintiff-Appellee,

VS. ORDER

IRA HENDERSON MURPHY,

Defendant-Appellant

Before: KEITH, PECK, Senior Judge and DOWD, District Judge*

Upon consideration of the petition for rehearing filed by the appellant, the court concludes that the issues raised therein were fully considered upon the original oral argument and descision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

Leonard Green, Chief Deputy

*Hon. David D. Dowd, United States District Judge for the Northern District of Ohio, sitting by designation.

APPENDIX E

No. 86-6025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. O R D E R

IRA HENDERSON MURPHY,

Defendant-Appellant

BEFORE: KEITH, Circuit Judge, PECK, Senior Circuit Judge and DOWD*, United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

*Hon. David W. Dowd, Jr. sitting by designation from the Northern District of Ohio.

APPENDIX F

STATUTES INVOLVED

1. 18 U.S.C. 1341, Fraud and Swindles, provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be

delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, section 34, 63 Stat. 94; Aug. 12, 1970, Pub.L. 91-375, section 6(j)(11), 84 Stat. 778.)

1. 18 U.S.C., Fictitious name or address, provides:

Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter,

postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be filed not more than $1,000 or imprisoned not more than five years, or both.

(June 25, 1948, c. 645, 62 Stat. 763, Aug. 12, 1970, Pub.L. 91-375, section 6(j)(12), 84 Stat. 778.)

2. 18 U.S.C. 1503, Influencing or injuring officer or juror genereally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the

discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(June 25, 1948, c. 645 Stat. 769; Oct. 12, 1982, Pub.L. 97-291, section 4(c), 96 Stat. 1253.)

3. 18 U.S.C., False declarations before grand jury or court

APPENDIX F

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceeding before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made

two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if-

(1) each declaration was material to the point in question, and

(2) each declaration is made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the

defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding affected the proceeding, or it has not become manifest that such falsity has been or will beexposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

(Added Pub.L. 91-452, Title IV,

APPENDIX F

section 401(a), Oct. 15, 1970, 84 Stat. 932, and amended Pub.L. 94-550, section 6, Oct. 18, 1976, 90 Stat. 2535.)

after the indictment, and we didn't have anything.

Mr. Ewing is correct, he's given me a tape recording and I guess we differ on what it shows.

THE COURT: All right, I will dictate an order and go back to the Motion for a Bill of Particulars. I had marked denied on that at first and I have reversed myself already.

Now, that takes care of --I'm denying the first part of Counts 1 through 11.

Now, which one do you want to do next, Mr. Hansom?

MR. HANSOM: Your Honor, the motion of the Defendant pursuant to Rule 7(d), which is a Motion to Strike the Surplusage, prejudicial remarks and statements in the indictment.

I recognize the Defendant has no right to redraft the indictment for the prosecution, but we have itemized particular things that we feel are not relevent to the

indictment, and could be prejudicial to the Defendant.

THE COURT: Well, I guess we'll just have to take--what is improper or, you know, sometimes evidence is inflammatory because it goes right to the guilt or innocense.

MR. HANSOM: Yes, sir.

THE COURT: I don't know enough about the facts, I'm not that familiar with why from Count 1(b) Item 16 on page 10 the following language should bestricken:

"On June 16, 1983."

Is it not relevant to the scheme?

MR. HANSOM: There is no allegation of any illegal receipt of money by Judge Murphy. That is not what the indictment is all about. He is not indicted for receiving any money, writing checks to himself and the Lodge; or anything like that.

When you take that statement, along with other statements contained in Count 13 concerning he was being investigated or the Grand Jury was conducting an investigation

which involved certain bingo operations being conducted in the City of Memphis and we submit that language is not essential to the Government in making its case under the eleven counts of mail fraud, the obstruction or the perjury.

THE COURT: All right, maybe Mr. Ewing can enlighten me on that.

MR. EWING: Your Honor--

THE COURT: Why is that part in there, Mr. Ewing?

MR. EWING: Well, Your Honor, Mr. Murphy is charged with devising a scheme to defraud, and obtaining--defraud the state in obtaining--this is on an annual basis, a registration for the bingo operation.

One of the elements of this crime is that Judge Murphy did this knowingly, wilfully and unlawfully. And I am sure that the Court will charge on what knowingly, wilfully, and unlawfully is. And the jury is going to have to determine did he do it by mistake, accident, or some other innocent

reason, or did he do with bad purpose to disobey or disregard the law.

It goes to his motive. Why would a person like Mr. Murphy submit false documents to the state, why would he forge somebody's name? And so it is relevant the fact that he got money out of the situation. It shows that as part of the scheme it says the scheme is in substance as follows. And then it sets out and part of the scheme is that Murphy obtained this money. That is part of the scheme as set out in Count 1 of the indictment. It goes through how monies would be made, certain proceded out of the bingo would be dilstributed by Smith, who was actually running the game, through a bookkeeper into the H. D. Whalum Lodge reserve account.

And the indictment in essence alleges the majority of those monies that went into this account went directly to Judge Murphy.

So it is highly relevant in this case to show criminal intent and motive in this

case.

So I can't imagine it is proper to strike this from the indictment, it is part of the scheme as alleged.

THE COURT: All right.

MR. HANSOM: Your Honor, in response, there is a distinct difference between proof that may or may not be admissible at trial, subject to the ruling of Your Honor, and what they allege in this indictment. You can't unring the bell then. If he says it becomes relevant to show there was honest mistake and he took this money for himself, if we get into that in the course of the trial and an objection is made then the Court can rule on what is and what is not admissible before the jury. But what is in here Mr. Ewing has chosen to put these statements within the body of the indictment, which clearly is the reason we make thismotion, this motion is something the jury is going to be able to see the

indictment and they're going to have that with them and they'll be working with it and that's why we move to strike that at this point.

Mr. Ewing may be correct, in the course of his proof in the trial, and depending on any defense alleged by the Defendant, he might be able to get that in and make certain allegations he has made here. But at this stage we say it is surplusaged and there is a clear chance of prejudice.

MR. EWING: Your Honor, the point is, what he is charged with, and on page four it says the scheme and artifice to defraud is in substance as follows: And part of the substance of this scheme is that Murphy obtained money.

MR. HANSOM: But Mr. Ewing said it himself, Your Honor, he is defrauding the state, he obtained a certificate to operate a bingo house under false pretenese is the

whole thrust of the Government's case, not that he got a penny out of it.

THE COURT: Well, what is the purpose of the fraud? There is a difference between the victim of a fraud and who is the beneficiary.

Why is it said that Mr. Murphy was going to all this trouble to defaud the state, he has a lot more to do if he didn't get something, what is in it for him? People don't go around devising schemes to defraud for a charitable purpose.

MR. HANSOM: I agree, Your Honor.

THE COURT: Well, obviously earlier you complained, and I'm not saying without justification, that Mr. Ewing gave a press release and said that all these thousands of dollars that's what you said, I'm not saying that, were involved in the fraud, and they went to Mr. Murphy, that Mr. Murphy was the charity.

I think we might as well fact up to that right now, that's going to be here,

Mr. Ewing is going to at least undertake to prove that the purpose of this fraud was to benefit Mr. Murphy financially. Isn't that correct?

MR. EWING: Yes, sir, that's one of the purposes.

THE COURT: What's the other one?

MR. EWING: Well, part of the scheme to defraud is to represent to the state false things in order to get this permit and to retain it and to make money himself. And certainly we will introduce the checks from this account, you know, the ones that were cashed at liquor stores and various places by Murphy.

THE COURT: All right, well, I think maybe we're talking about the objects and purposes. The object of the fraud or the scheme was the state that issues these certificates. The purpose, I think, from what you say, is that the purpose was to benefit Mr. Murphy by financial gains for

himself individually.

MR. EWING: Yes, sir.

THE COURT: I overruled the motion on that, number 1 in the motion pursuant to Rule 7(d), and I will hear these one at a time.

Well, this is along the same lines.

MR. HANSOM: Item 2 would be the same.

THE COURT: All right, I overrule it.

Majority of the monies distributed were converted to Murphy's own use, I overrule that, that's the same thing.

MR. HANSOM: 4 and 5 will be essentialldy the identical.

THE COURT: Well, are 4 and 5 different from 1, 2 and 3?

MR. HANSOM: Well, yes, they deal--

THE COURT: Tell me what they are about.

MR. HANSOM: They deal with statements in the indictment which say in effect--I can give for example Count 13 Item 2 page 22 says:

No. 88-210

In the Supreme Court of the United States

OCTOBER TERM, 1988

IRA HENDERSON MURPHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's convictions for perjury and obstruction of justice were tainted by the "spillover" effect of evidence offered in support of mail fraud charges that were dismissed by the court of appeals.

2. Whether the evidence was sufficient to support petitioner's perjury conviction.

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IRA HENDERSON MURPHY, PETITIONER

v.

UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 836 F.2d 248.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1988. Petitions for rehearing were denied on March 7, 1988, and May 16, 1988.[1] The petition for a writ of certiorari was filed on July 15, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Tennessee, petitioner was con-

[1] Both petitioner and the government filed rehearing petitions.

victed on 11 counts of mail fraud, in violation of 18 U.S.C. 1341; one count of obstruction of justice, in violation of 18 U.S.C. 1503; and one count of making a false declaration before a federal grand jury, in violation of 18 U.S.C. 1623. He was sentenced to concurrent prison terms of five years on each count and was fined $5,000 on the obstruction of justice count. The court of appeals affirmed the convictions for obstruction of justice and perjury and reversed the convictions for mail fraud (Pet. App. 1a-18a).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 2a-3a). It showed that in 1982 petitioner, then a judge of the Court of General Sessions in Memphis, Tennessee, engaged in a series of mailings to the Tennessee authorities designed to cause a bingo license to be issued for the H.D. Whalum Lodge No. 373. Petitioner provided documentation falsely stating that (1) the Lodge was tax exempt under Section 501(c)(3) of the Internal Revenue Code (26 U.S.C.); (2) no member of the sponsoring organization would receive profits from the bingo game; and (3) all persons conducting the bingo game had been members of the sponsoring organization for one year. The initial license application for the Lodge bore the signature "Charles Brooks," and petitioner notarized that signature. Although the Lodge was inactive, petitioner permitted Ronald Smith to use the Lodge license to operate a bingo game. In return, Smith paid petitioner $200 a week. Pet. App. 2a-3a.

Federal investigators subsequently questioned petitioner about his involvement in the operation of the Whalum Lodge bingo game. Petitioner denied any misconduct. The investigators thereafter located and interviewed Charles Brooks, who denied membership in the Lodge and denied the authenticity of his purported signature on the documents relating to the Lodge. Brooks also informed the in-

vestigators that petitioner had offered him $7,000 to help prevent the investigators and the grand jury from discovering petitioner's involvement in the bingo operation. Brooks agreed to tape-record his conversations with petitioner. In those recorded conversations petitioner again solicited Brooks' cooperation and promised to pay him $7,000 in return. Pet. App. 3a.

Subsequently, petitioner appeared before the federal grand jury. After being advised that he was a subject of the investigation, petitioner denied knowing that signatures on documents submitted in support of the Lodge bingo license were forgeries. Pet. App. 3a.

2. The court of appeals affirmed in part and reversed in part (Pet. App. 1a-18a). The court first held (*id.* at 4a-12a) that the indictment failed to state the crime of mail fraud, as articulated in this Court's decision in *McNally* v. *United States*, No. 86-234 (June 24, 1987). In any event, the court added (Pet. App. 12a-13a), the mail fraud convictions were improper because the instructions to the jury had impermissibly broadened the scope of the indictment. The court nevertheless affirmed the obstruction of justice and perjury convictions, rejecting petitioner's claim that those convictions were tainted by the "spillover" effect of the testimony advanced in support of the mail fraud charges (Pet. App. 14a-16a). The court explained (*id.* at 16a) that the "mail fraud charges constituted conceptually a totally separate type of crime from that of obstructing justice and perjury." The court also noted (*id.* at 15a) that even if the mail fraud counts had been severed from the remaining charges, "the evidence of [petitioner's] conduct which formed the basis of the mail fraud prosecutions would have been admissible under the provisions of Evidence Rule 404(b) to set in proper perspective the [petitioner's] conduct as it related to the obstruction and perjury charges." Finally, the court rejected (*id.* at 17a) peti-

tioner's claim that his answers to the grand jury were literally true and therefore could not support a perjury conviction.

ARGUMENT

1. Petitioner contends (Pet. 9-24) that his perjury and obstruction of justice convictions were tainted by the "spillover" effect of evidence relating to the invalid mail fraud counts. The court of appeals correctly rejected that claim. As the court explained (Pet. App. 16a), "the mail fraud charges constituted conceptually a totally separate type of crime from that of obstructing justice and perjury." There is accordingly no reason to doubt that the jury was able to segregate the evidence and apply it only to the charges to which it was relevant, as the trial court expressly instructed the jury to do (Tr. 1429). See, *e.g.*, *United States* v. *Alvarez*, 755 F.2d 830, 858-859 (11th Cir.), cert. denied, 474 U.S. 905 (1985); *United States* v. *Krevsky*, 741 F.2d 1090, 1094 (8th Cir. 1984); *United States* v. *Escalante*, 637 F.2d 1197, 1204 (9th Cir.), cert. denied, 449 U.S. 856 (1980). Moreover, even if the mail fraud charges had been severed from the perjury and obstruction of justice counts, as petitioner now urges, the evidence of petitioner's involvement in the fraudulent bingo scheme would have been admissible to establish petitioner's motive for committing perjury and obstructing justice. See *United States* v. *Lane*, 474 U.S. 438, 450 (1986).[2]

The court of appeals' decision is not in conflict with the decision of the Eleventh Circuit in *United States* v. *Stefan*, 784 F.2d 1093 (1986). In *Stefan*, the court stated (*id.* at

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[2] Petitioner suggests (Pet. 16-17) that the court of appeals refused to consider his "spillover" claim because he did not make a severance motion at trial. That is simply not so. The court of appeals reviewed that claim and rejected it on the merits (Pet. App. 14a-16a).

1101) that "important factors" in determining whether an invalid RICO count tainted convictions on other counts are: "(1) [w]hether the jury meticulously sifted the evidence; and (2) whether the appellant was prejudiced by a spill over of evidence relating to [the] other counts * * *." The court explained (*ibid.*) that the jury's decision to return a split verdict in the case demonstrated that it had "meticulously sifted" the evidence. The court did not hold, however, that a finding of no prejudicial spillover may be made *only* in cases where a split verdict has been returned. There is no reason to suppose that on the present record the Eleventh Circuit would reach a different result from the one reached by the court below.[3]

2. Petitioner contends (Pet. 24-25) that the evidence was insufficient to support his perjury conviction because his testimony before the grand jury was literally true. The grand jury testimony in question was as follows (Pet. App. 23a-24a):

Q. Was Mr. Smith a member of the H. D. Whalum Lodge?
A. Who is that; Ronnie Smith?
Q. Yeah.
A. No, sir.
Q. Was he supposed to be a member in order to run the bingo?
A. I would have to—the statute speaks for itself on that, Mr. Ewing.
Q. I think you know what the statute provides.
A. I wouldn't be so sure about that.
Q. Did you have anything to do with making out membership cards for anybody?

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[3] The cases cited by petitioner (Pet. 14-16) turn on their individual facts and do not involve a different legal standard for deciding whether there has been prejudicial spillover.

A. The membership applications, other than securing them, but that was about all. No, I didn't have anything specifically to do with the cards per se.

Q. Well, let me show you one of these little yellow cards that says the H.D. Whalum Lodge Auxiliary Committee, have you ever seen one of those?

(Thereupon, the above-described [sic] card was passed to the witness.)

A. No, sir.

Q. You have never seen one of those cards?

A. I don't have any recollection of ever seeing one. It shocks me when I see that.

Q. Do you know Charles Brooks?

A. Yes, sir.

Q. Do you know whether he signed those cards?

A. I wouldn't know.

Q. Mr. Murphy, do you have any knowledge [whether] any signatures on any documents submitted to the State are forgeries?

A. Not to my knowledge. I am standing behind my privilege, but not to my knowledge have I known of any signatures that were forgeries.

Q. You say that you are standing behind your privilege.

A. Yes, sir. I don't know of any forged signatures being submitted to the State.

The government's evidence showed that petitioner's testimony was false. Charles Brooks testified at trial that he had never signed the yellow membership cards, nor had he given petitioner permission to sign the cards for him (Gov't C.A. Br. 45). Moreover, a handwriting expert identified the signature on the cards as petitioner's (*ibid.*). From that evidence, the jury was entitled to conclude that petitioner had lied to the grand jury when he testified that

he had never seen the cards, that he did not know whether Brooks had signed the cards, and that he did not know whether any signature on the cards had been forged.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1988

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